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In The Supreme Court

OF THE

United States

October Term, 1986

APOLLO OF THE OZARKS, INC.,
AND RED ROCKET FIREWORKS,
Petitioners,

vs.

SPIRO GIOTIS AND MALCOLM GILLESPIE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

May a manufacturer or primary distributor of fireworks be subjected to jurisdiction in Wisconsin, consistently with the due process clause, where the only contact between that party and Wisconsin is that a firework may have been sold by that party to a distributor in Illinois, who sold the firework to a Minnesota resident in violation of Minnesota law, who brought the firework to Wisconsin in violation of Wisconsin law, where it was set off, again in violation of Wisconsin law, thereby injuring an Illinois resident?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Cyril James Warrilow was a party as defendant-appellee below, but no arguments were raised on appeal with respect to his dismissal from the case.

Capitol Fireworks Company and John Heffinger, Jr. remain parties in this action before the District Court as third-party defendants, but were not parties to the appeals to the Seventh Circuit.

Petitioners Apollo and Red Rocket are both Missouri corporations without parent corporations, partially-owned subsidiaries, or affiliates.

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No. _____

IN THE SUPREME COURT

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UNITED STATES

October Term, 1986

Apollo of the Ozarks, Inc.,
and Red Rocket Fireworks,
Petitioners,

vs.

Spiro Giotis and Malcolm Gillespie,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 4, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit and dissenting opinion are reported at 800 F.2d 660, and are reproduced in Appendix A. The decision of the United States District Court for the Eastern District of Wisconsin granting the motion to dismiss of Petitioner Apollo of the Ozarks, Inc. is not reported, and is reproduced in Appendix B. The decision of the United States District Court for the Eastern District of Wisconsin granting the motion to dismiss of Petitioner Red Rocket Fireworks is not

reported, and is reproduced in Appendix C.

JURISDICTION

By judgment entered on September 4, 1986, the United States Court of Appeals for the Seventh Circuit reversed the judgments of the United States District Court for the Eastern District of Wisconsin, which granted the Petitioners' motions to dismiss on the grounds that personal jurisdiction over Petitioners could not be maintained in Wisconsin under the due process clause of the fourteenth amendment to the United States Constitution. The Seventh Circuit denied rehearing on October 27, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of the

fourteenth amendment to the United States Constitution states:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On July 4, 1982, Respondent Spiro Giotis was injured when struck by a firework at a party in Hartland, Wisconsin. (Appendix A-2.) Petitioners Apollo of the Ozarks, Inc. ("Apollo") and Red Rocket Fireworks ("Red Rocket") are two of the possible sources of the firework that struck Giotis. The relevant facts concern the business done by Petitioners and the route that the firework may have taken to reach Hartford, Wisconsin.

Apollo is a Missouri corporation engaged in the manufacture and distribution of fireworks. Apollo had

two retail outlets in Missouri, and also sold at wholesale to distributors in as many as 15 states, which did not include Wisconsin. Apollo advertised through billboards, radio, and local newspapers within Missouri. (Appendix A-3.) There is no evidence that Apollo has ever done business of any kind in Wisconsin, and there is no evidence that any firework manufactured or distributed by Apollo has ever been sold in Wisconsin at any point in the distribution chain.

Red Rocket is a Missouri corporation engaged in the business of distributing fireworks, most of which Red Rocket imports from manufacturers in China. Red Rocket has retail outlets in Missouri, and offices in Missouri and Louisiana. Red Rocket sells to distributors in at least 10 states, which do not include Wisconsin. (Appendix

A-3.) There is no evidence that Red Rocket has ever done business of any kind in Wisconsin, and there is no evidence that any firework distributed by Red Rocket has ever been sold in Wisconsin at any point in the distribution chain.

Both Apollo and Red Rocket were normal sources of supply to Capitol Fireworks Company ("Capitol"), an Illinois corporation doing business in Springfield, Illinois. Capitol solicited orders through advertisements in American Rifleman, a nationally-distributed magazine. Capitol's advertisements in American Rifleman stated that it would not sell fireworks where prohibited by law. (Appendix A-2.)

Respondent Malcolm Gillespie, Jr. ("Gillespie"), a Minnesota resident, ordered fireworks from Capitol by mail in response to Capitol's advertisement in

American Rifleman. Despite Minnesota's prohibition of fireworks, Capitol filled Gillespie's order by shipping fireworks to Gillespie's home in White Bear Lake, Minnesota. (Appendix A-2.)

Gillespie then brought the fireworks with him to the home of John Heffinger in Hartland, Wisconsin. The unauthorized sale, use, or possession of fireworks is prohibited in Wisconsin. Without authorization, Gillespie and others set off the fireworks, one of which allegedly struck Giotis. (Appendix A-2.)

Giotis, an Illinois resident, filed suit in the United States District Court for the Eastern District of Wisconsin, eventually naming as defendants Gillespie, Apollo, Red Rocket, and several other fireworks distributors and insurers. Jurisdiction in the District Court was based on diversity of

citizenship, 28 U.S.C. § 1332. Gillespie filed third-party claims against Capitol and John Heffinger, Jr., as well as claims against several defendants, including Apollo and Red Rocket.

On December 21, 1984, the District Court granted Apollo's motion to dismiss for lack of personal jurisdiction. (Appendix B.) On July 11, 1984, the District Court granted Red Rocket's motion to dismiss for lack of personal jurisdiction. (Appendix B.) Giotis and Gillespie each appealed from the judgments of dismissal in favor of Apollo and Red Rocket.

On September 4, 1986, the United States Court of Appeals for the Seventh Circuit reversed the judgments dismissing Apollo and Red Rocket. One member of the panel dissented, noting that:

the court's holding today will

> effectively abolish any due process restrictions on personal jurisdiction over manufacturers and distributors of moveable products. Indeed, the holding suggests that, because manufacturers and primary distributors are at the head of the distribution system, they should reasonably expect to be sued in any jurisdiction into which a purchaser may transport their product.

The Seventh Circuit denied rehearing on October 27, 1986.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the decision of the United States Court of Appeals for the Seventh Circuit is in conflict with applicable decisions of this Court, or, in the alternative, because the United States Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

I THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THIS COURT.

In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980), this Court emphatically rejected the proposition that an intermediate seller of a chattel must "in effect appoint the chattel his agent for service of process." The Seventh Circuit's decision in the present case requires a manufacturer and a primary distributor of chattels to in effect appoint the chattels their agents for service of process. Because there is no principled basis for distinguishing between a manufacturer or primary distributor and a seller further down the distribution chain, the Seventh Circuit's decision is in direct conflict with a decision of this Court.

World-Wide Volkswagen concerned the

amenability to jurisdiction in Oklahoma of the retailer and the regional distributor of a car that was sold in New York but involved in an accident in Oklahoma. The manufacturer and importer of the car were also defendants. Although only sellers near the lower end of the distribution chain contested jurisdiction in that case, this Court adopted a rule that applies to sellers at any link in the distribution chain.

This Court relied on the general principle that due process does not permit the exercise of personal jurisdiction over a foreign corporation unless that corporation "purposefully avails itself of the privilege of conducting activities within the forum State." 444 U.S. at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

The Court then fashioned a rule for

determining whether a sale of a product is a sufficient "purposeful availment" to permit the exercise of personal jurisdiction over the seller in a products liability suit:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

444 U.S. at 297. The Court specifically explained that a manufacturer could be subjected to jurisdiction if it delivered its products into the stream of commerce "with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 298.

Since the sellers contesting jurisdiction in World-Wide Volkswagen limited their sales efforts to New York, Connecticut, and New Jersey, they had no expectation that their products would be purchased in Oklahoma and had not attempted to serve the automobile market in Oklahoma. Oklahoma's assertion of jurisdiction over those sellers, therefore, violated due process.

World-Wide Volkswagen clearly requires consideration of the scope or reach of the distribution system for a product. Only if the forum state is encompassed within the expected scope or reach of the distribution system after the product leaves the seller's hands, or "below" the seller, may the seller be subjected to suit.

The expected scope of the distribution system below a seller will,

of course, vary according to the position of that seller in the overall distribution scheme. A seller nearer the top of a distribution chain may be subject to jurisdiction in more states than a seller lower in the same distribution chain. The same question, however, must be asked concerning a seller at any level: has this seller purposefully attempted to sell products, directly or indirectly, in the forum state?

This question may be easily answered in the present case. There is no evidence in the record that even a single item manufactured or sold by Apollo or Red Rocket has ever been sold in Wisconsin at any stage of distribution. There is no evidence that Apollo or Red Rocket has ever advertised or engaged in any other type of business activity in

Wisconsin. The only contact connecting Apollo or Red Rocket with Wisconsin is that a firework that may have been sold by one of them to Capitol was sold by Capitol to a Minnesota resident, in violation of Minnesota law, and then transported to and used in Wisconsin, in violation of Wisconsin law.

The relationship of Wisconsin to Apollo and Red Rocket is precisely the same as was the relationship of Oklahoma to the regional distributor and retail dealer in World-Wide Volkswagen. In this case, as in World-Wide Volkswagen, the only contact between the forum state and the sellers is that the product was used and caused injury in the forum state.

The Seventh Circuit essentially concluded that a seller at the head of a distribution network, such as a manufacturer or importer, has always

"purposefully availed" itself of the privilege of conducting business in any state where the seller's product is used and causes injury. This conclusion has the effect of holding any manufacturer subject to suit in any state where its product causes injury. Precisely this result was rejected by this Court in World-Wide Volkswagen.

The only possible distinction between the present case and World-Wide Volkswagen is that Apollo and Red Rocket are at the head of their respective distribution networks, as manufacturer in the case of Apollo and as importer and primary distributor in the case of Red Rocket. That such a distinction is untenable is demonstated by the express language of World-Wide Volkswagen, where this Court held that jurisdiction was proper where "the sale of a product of a

manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence." 444 U.S. at 297. Contrary to the Seventh Circuit's opinion, therefore, the same rule that applies to a retailer also applies to a seller at the head of a distribution network.

The absence of a principled basis for distinguishing the case at bar from World-Wide Volkswagen will, if the Seventh Circuit's decision is allowed to stand, result in uncertainty in the law and erosion of the principles enunciated in World-Wide Volkswagen.

II THE RATIONALE OF THE SEVENTH CIRCUIT'S OPINION CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT.

The opinion of the Seventh Circuit panel majority circumvents the direct application of World-Wide Volkswagen by concluding that a manufacturer or primary

distributor always purposefully avails itself of the privilege of doing business wherever its products may be found. Two reasons are given for this conclusion; both are directly contradicted by opinions of this Court.

The primary rationale throughout the Seventh Circuit's majority opinion is that Apollo or Red Rocket has derived an economic benefit from the forum state. The panel majority reasoned that a seller at the head of a distribution network:

> realizes the much greater economic benefit of multiple sales in distant forums, of which the purchase by the particular buyer who has brought suit is merely one example. A seller, since it realizes this greater economic benefit, may more easily satisfy the purposeful availment test and be sued by a buyer in the buyer's forum than a buyer may be sued by the seller in the seller's forum.

(Appendix A-12.) The panel further

reasoned:

> Such a seller [at the head of a distribution network], because of intervening levels of distribution, may not have mentally formed a purpose to sell its product to the particular individual buyer who is suing it, but the seller surely has purposefully chosen to sell generally to buyers in the forum state and reaps the economic benefit of doing so.

(Appendix A-13.) The panel further noted that "Defendants cannot deny having received the economic benefits of doing business in states where fireworks are illegal." (Appendix A-14 to A-15.)

There is no evidence in the record in the present case that even a single item manufactured or sold by Apollo has ever been sold in Wisconsin at any stage of the distribution chain. The economic benefit to which the panel majority refers must be the economic benefit earned by the sale of goods that are

eventually used in Wisconsin. The panel majority's reasoning is similar to the contention made in World-Wide Volkswagen that "jurisdiction can be supported by the fact that petitioners earn substantial revenue from goods used in Oklahoma." 444 U.S. at 298. This Court rejected that reasoning, holding that "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." 444 U.S. at 299.

The second factor relied upon by the panel majority concerns the actions of Capitol, the distributor which allegedly purchased the fireworks from Apollo and sold them through a catalog to Gillespie in Minnesota. The panel majority states that Apollo and Red Rocket "knowingly"

sell to:

> Capitol, an interim distributor who in turn advertises fireworks nationwide by advertisements in American Rifleman. Capitol's advertising is calculated to reach buyers in distant forums, an important factor in determining whether Capitol has purposefully availed itself of the benefits of doing business in the forum state. . . . There is no evidence that the defendants were unaware of this scope of Capitol's sales efforts. . . .

(Appendix A-13.)

The Seventh Circuit's reliance on Capitol's sales efforts is in conflict with the principle, well-established by decisions of this Court, that a defendant's amenability to jurisdiction must be measured by the actions and expectations of that defendant, and not the unilateral activity of some other person. Most recently, this Court has explained.

> The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, . . . or of the "unilateral activity of another party or a third person," . . . . Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum state.

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (citations omitted) (emphasis in original). See also Helicopteros Nacionales de Columbia, S. A. v. Hall, 466 U.S. 408, 417 (1984).

III THE FEDERAL COURTS OF APPEALS USE CONFLICTING ANALYSES IN APPLYING WORLD-WIDE VOLKSWAGEN TO SELLERS AT THE HEAD OF DISTRIBUTION NETWORKS.

In World-Wide Volkswagen this Court declared that:

> the foreseeability that is critical to due process is not the mere likelihood that a product will find its way into the forum State. Rather, it

> is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

444 U.S. at 297. The Court then discussed the circumstances under which a manufacturer or distributor of products might be properly subjected to jurisdiction, and noted that:

> The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

444 U.S. at 297-98. Although this language is merely part of the Court's development of the rule requiring consideration of the expected scope of the distribution network below the seller, some of the lower federal courts have seized upon the phrase "stream of

commerce" and have used it to muddy the rule to such a degree that jurisdiction is occasionally upheld even when based entirely on "the mere likelihood that a product will find its way into the forum State." The present case is one of the more extreme examples of jurisdiction being upheld on this basis, so clearly disapproved in World-Wide Volkswagen.

Applying the World-Wide Volkswagen rule to a manufacturer or primary distributor properly requires a court to determine whether the seller could expect its product to be sold eventually in the forum state. Thus, for example, the Fifth Circuit in Oswalt v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980), upheld jurisdiction over a manufacturer who "had every reason to believe its product would be sold to a nation-wide market, that is, in any or all states," especially since

the product was in fact sold in the forum state. Other federal courts have also properly considered the manufacturer's knowledge that its product would be sold in the forum state. See, e.g., Noel v. S.S. Kresge Co., 669 F.2d 1150 (6th Cir. 1982); Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155 (9th Cir. 1980).

Other courts have, however, developed a "stream of commerce" theory that relies on the economic benefits derived by manufacturers. This theory was clearly stated by the court in Sousa v. Ocean Sunflower Shipping Co., 608 F. Supp. 1309, 1313 (N.D. Cal. 1984):

> The stream of commerce theory posits that by distributing a product nationally, a manufacturer has submitted voluntarily to the jurisdiction and laws of any state to which the product travels. . . .

. . . .

> Thus, there is a decidely "economic" rationale underlying the stream of commerce theory. Positioned at the start of the distribution system, a manufacturer purposefully conducts its activities to make its products available for purchase in as many forums as possible, thereby directly and indirectly serving a wide market.

If jurisdiction under the "stream of commerce" theory were based only on the economic benefit derived by the manufacturer, there would be no logical reason to limit that theory to cases where the benefit is derived from the sale, rather than the mere use, of the product in the forum state. Thus, the Ninth Circuit has upheld jurisdiction in at least two cases by reasoning that foreign defendants had reason to believe that their products would be used in the forum state. See Hedrick v. Daike Shojo

Co., 715 F.2d 1355 (9th Cir. 1983) opinion vacated in part, 733 F.2d 1335, (1984); Raffaele v. Compagnie Generale Maritime, 707 F.2d 395 (9th Cir. 1983). Cf. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir.), cert. denied, 454 U.S. 1085 (1981) (dismissal for lack of personal jurisdiction affirmed because benefits deriving from use of product in forum state were too indirect).

While the Ninth Circuit has used the economic benefit aspects of the "stream of commerce" theory to uphold jurisdiction based on "the mere likelihood that a product will find its way into the forum State," the Seventh Circuit has used the same economic benefit analysis to formulate an irrebuttable presumption that sellers at the head of distribution systems

purposefully avail themselves of doing business wherever possible.

In Nelson by Carson v. Park Industries, 717 F.2d 1120 (7th Cir. 1983), cert. denied, 465 U.S. 1024 (1984), the court reasoned that:

> the relevant scope is generally broader with respect to manufacturers and primary distributors of products who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible.

717 F.2d at 1125. Although in Nelson the court maintained the requirement that the seller be aware of the scope of the distribution system, 717 F.2d at 1126, the Seventh Circuit's opinion in the present case demonstrates that it is willing to impute such awareness to

manufacturers and primary distributors even where the distribution system does not in fact encompass the forum state and three laws were violated before the product was used in the forum state.

The Courts of Appeals have clearly had difficulty applying World-Wide Volkswagen to manufacturers and primary distributors. This case affords the Court an opportunity to clarify the proper analysis in a situation where the expected scope of the distribution system may not merely be assumed to be nationwide.

IV THE QUESTION IS IMPORTANT AND SHOULD BE DECIDED.

The impact of the Seventh Circuit's decision in this case will extend far beyond the particular facts presented. The effect of the Seventh Circuit's opinion was succinctly stated by the

dissenting judge:

> [T]he court's holding today will effectively abolish any due process restrictions on personal jurisdiction over manufacturers and distributors of moveable products.

(Appendix A-20 to A-21.)

Products liability is an important concern for manufacturers and distributors today. Products liability insurance is rapidly growing more expensive and difficult to obtain in many instances. Concern with the increasing expense and unpredictability of products liability insurance and defense has attracted the attention of many state legislatures as well as Congress.

Manufacturers and distributors, particularly smaller ones, may wish to limit their exposure to suit by restricting their activities to a geographic area less than national in

scope. The Seventh Circuit's opinion makes it quite doubtful that such efforts will afford real protection. Manufacturers and distributors need a definitive statement of the law on which to rely in their planning. Moreover, since products liability is often insured, predictability is essential. Uncertainty in the law in this area will require insurers to set premium rates according to the worst possible case.

V A DECISION IN THIS CASE WOULD COMPLEMENT THIS COURT'S EXPECTED DECISION IN ASAHI METAL INDUSTRY CO. V. SUPERIOR COURT.

In Asahi Metal Industry Co. v. Superior Court, No. 85-693 (oral argument heard November 5, 1986), this Court is expected to decide whether a Taiwanese manufacturer of a tire valve, which was sold to a Taiwanese manufacturer who incorporated the valve into

a tire tube that was sold in California, may be held subject to jurisdiction in California in a suit alleging that the valve was defective.

There are two crucial differences between the present case and Asahi. While Asahi involves a component manufacturer, the present case involves a manufacturer and distributor of a finished product. In Asahi, there was no question but that the defendant knew that its product would be eventually sold in California, while in the present case the Petitioners' product was never sold, but only used in Wisconsin. Moreover, in this case the product came to be used in Wisconsin only through a chain of events involving three violations of state laws as well as Capitol's violation of its stated policy of not selling fireworks where prohibited.

Consideration of this case as well as Asahi will permit this Court to delineate the amenability to jurisdiction of manufacturers by examining the question from two different perspectives. Both cases concern World-Wide Volkswagen's requirement that the manufacturer must place the product into the stream of commerce with the expectation that it will be purchased in the forum state. In Asahi the Court will decide whether jurisdiction may be based on that expectation alone with respect to a component manufacturer who has no control over the product once it is incorporated into a finished article. This case presents the opportunity to decide whether jurisdiction may be upheld even without that expectation with respect to a seller at the head of a distribution network. In other words, by considering

this case and Asahi, the Court can decide whether that expectation is as necessary as well as a sufficient predicate for jurisdiction.

This case also affords the Court an opportunity to clarify the distinction between sale and use of the product in the forum state, which has caused confusion among the Circuits and is not presented in Asahi.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 85-1835, 85-2206, 85-2584 and 85-2656

SPIRO GIOTIS,

Plaintiff-Appellant,

v.

APOLLO OF THE OZARKS, INC., RED ROCKET FIREWORKS, a corporation, and CYRIL JAMES WARRILOW, Lead Underwriter,

Defendants-Appellees,

and

MALCOLM GILLESPIE,

Defendant and Third-Party Plaintiff-Appellant,

v.

CAPITOL FIREWORKS COMPANY and JOHN HEFFINGER, JR.,

Third-Party Defendants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 82 C 1596—**Terence T. Evans**, *Judge.*

ARGUED FEBRUARY 26, 1986—DECIDED SEPTEMBER 4, 1986

CUMMINGS, *Chief Judge*, CUDAHY, *Circuit Judge*, and BARKER, *District Judge.**

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* The Honorable Sarah Evans Barker, District Judge for the Southern District of Indiana, is sitting by designation.

CUMMINGS, *Chief Judge*. This appeal comes to us from the district court's grant of motions by defendants Apollo of the Ozarks, Inc. ("Apollo") and Red Rocket Fireworks ("Red Rocket") to dismiss for lack of personal jurisdiction. This case once again requires this Court to explore the limitations of personal jurisdiction over non-consenting, nonresident defendants that are mandated by the constitutional requirement of due process. For the reasons set forth below, we reverse the judgments of the district court granting these defendants' motions to dismiss.

I

This case arises out of injuries suffered by plaintiff Spiro Giotis ("Giotis") at a Fourth of July party in Wisconsin. Third-party plaintiff Malcolm Gillespie, Jr. ("Gillespie"), a Minnesota resident, had purchased fireworks from Capitol Fireworks Company ("Capitol"), by completing a mail order form that appeared in Capitol's advertisement in the magazine *American Rifleman*. Capitol shipped the fireworks to White Bear Lake, Minnesota, where Gillespie resided at the time. Gillespie brought the fireworks with him to a party in Hartland, Wisconsin, on July 4, 1982. Gillespie and others discharged the fireworks, and one of the fireworks allegedly struck and injured Giotis who subsequently sued Gillespie, Apollo, Red Rocket and others.

Capitol is a distributor of fireworks, and allegedly sold the fireworks to Gillespie that caused the injuries to Giotis. Capitol is an Illinois corporation doing business in Springfield, Illinois. Capitol solicited business and orders through various magazines, including advertising nationwide through the *American Rifleman* magazine. It was through the advertisement in *American Rifleman* that Gillespie learned about Capitol and its fireworks. Capitol's advertisement stated that the fireworks would not be sold where prohibited by law, but Capitol sent the fireworks to Gillespie's residence in Minnesota, and both Minnesota and Wisconsin prohibit fireworks.

Apollo is a manufacturer of fireworks that may have manufactured and distributed to Capitol the fireworks that caused the injuries to Giotis. Apollo is a Missouri corporation which had a business office and retail outlet in Stanton, Missouri, and another retail outlet in Marshall, Missouri. Both retail outlets were located on the interstate highway. Apollo advertised on billboards placed along the interstate highway in Missouri, in local newspapers, and on local radio. In 1980 and 1981, Apollo's president, Thomas S. Scaman, said that Apollo may have distributed fireworks in fifteen states, including Alabama, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, and Texas, but not in Wisconsin. Scaman at one point characterized Apollo's business as selling mainly to big wholesalers who, in turn, sell to others. Capitol is one of the Illinois distributors to whom Apollo distributed fireworks.

Red Rocket is a distributor of fireworks that may have distributed to Capitol the fireworks that caused the injuries to Giotis. Red Rocket is a Missouri corporation with offices in Missouri and Louisiana. Red Rocket sells primarily (85-90% of its sales) to distributors, and during 1982 sold fireworks to distributors in at least ten states, but not in Wisconsin. Red Rocket also sells fireworks directly to consumers through gift shops located at its warehouses and has two signs along the interstate highway near Strafford, Missouri, advertising its retail outlet there.

Subsequent to sustaining injuries from the fireworks on July 4, 1982, Giotis filed suit against Gillespie, Apollo, Red Rocket, and various other persons, fireworks producers, and insurance companies. Gillespie filed a third-party complaint against Apollo, Red Rocket, Capitol and others, for contribution and/or indemnification. On December 21, 1984, the district court granted Apollo's motion to dismiss for lack of personal jurisdiction. The district court subsequently granted Red Rocket's motion to dismiss for lack of personal jurisdiction. This appeal followed.

II

Before reaching the merits of this dispute over personal jurisdiction, we must first deal with some procedural preliminaries. More specifically, Red Rocket admits that it failed to raise the defense of personal jurisdiction in its initial answer to Giotis' complaint, as required by Fed. R. Civ. P. 12(h)(1). However, Gillespie, the third-party plaintiff, compounded the problem by never objecting in the court below to Red Rocket's later, untimely motion raising the defense of personal jurisdiction. We are thus faced with the problem of what to do when a party raises for the first time on appeal the opposing party's failure to timely raise the affirmative defense of personal jurisdiction. In short, we must decide whether a party can waive a waiver of the defense of personal jurisdiction.

There is no dispute that normally a failure to timely raise the defense of personal jurisdiction waives the defense; Fed. R. Civ. P. 12(h)(1) is unequivocal on this point, and Red Rocket has admitted in its brief to this Court that it failed to timely raise this defense. It is equally clear that as a general rule an argument that is not raised below cannot be raised for the first time by an appellant in this Court. *Singleton v. Wulff*, 428 U.S. 106, 121; *Gehl Company v. Commisioner*, No. 85-1326, slip op. at 15-16 (7th Cir. July 9, 1986); *National Metalcrafters v. McNeil*, 784 F.2d 817, 825 (7th Cir. 1986); *Mattingly v. Heckler*, 784 F.2d 258, 261 n.2 (7th Cir. 1986); *Erff v. Markhon Industries, Inc.*, 781 F.2d 613, 618 (7th Cir. 1986). We have further recognized that there can be a waiver of a waiver, *i.e.*, "a defense of waiver can itself be waived by not being raised." *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986); see also *Jordan v. Kelly*, 728 F.2d 1, 4 (1st Cir. 1984). However, we have also noted that this waiver rule has its exceptions, and we retain discretion to reach an issue initially raised on appeal in certain situations. *Gehl*, slip op. at 15-16. There are several reasons for the general rule requiring issues on appeal to have been raised below: the desire to receive the district court's views on the issue, the need for a fac-

tual record to answer the issue, and the desire to avoid having to decide an issue that might not have had to be decided if the district court had had the opportunity to decide the issue. These considerations affect our decision to exercise discretion to reach the issue; for example, we are more likely to reach an issue if it does not require a new factual record. *National Metalcrafters*, 784 F.2d at 826; *Sgro v. United States*, 609 F.2d 1259, 1264 n.8 (7th Cir. 1979).

In this case, however, because the issue not raised below was Red Rocket's failure to plead the defense of personal jurisdiction in a timely fashion, and the district court proceeded to reach the merits of the personal jurisdiction issue without objections from the parties, Fed. R. Civ. P. 15(b) might be relevant. Rule 15(b) states that when an issue not raised by the pleadings is nevertheless tried by the express or implied consent of the parties, the issue is treated as if it had been raised in the pleadings. If Rule 15(b) were to apply to the instant case, it would mean that Gillespie has impliedly consented to litigate the issue of personal jurisdiction, thereby excusing Red Rocket's failure to raise the issue in a timely fashion.

The issue of whether Rule 15(b) applies to the instant case is a difficult question. Rule 15(b) applies to affirmative defenses not properly included in the answer. *Trapnell v. Riggsby*, 622 F.2d 290, 294 (7th Cir. 1980); *Wagner v. United States*, 573 F.2d 447, 452 (7th Cir. 1978); *Federal Savings and Loan Insurance Corp. v. Hogan*, 476 F.2d 1182, 1186 (7th Cir. 1973); see generally WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1492 (1971) (hereinafter referred to as Wright & Miller). This Court and others have used Rule 15(b) to reach a general affirmative defense that was not properly included in defendant's answer in the district court but was not objected to by the plaintiff when the defense was eventually raised and was reached and decided by the district court on the merits. See, *e.g.*, *Wagner*, 573 F.2d at 452; *Bradford Audio Corp. v. Pious*, 392 F.2d 67, 73-74 (2d Cir. 1968); see generally Wright & Miller § 1494. However, these

previous cases involve general affirmative defenses governed by Civil Rules 8(c) and 8(d), whereas the instant case involves one of the seven special affirmative defenses governed by Rule 12(h). The failure to plead any type of affirmative defense can result in a waiver, but Rule 12(h) explicitly governs the waiver of the seven special affirmative defenses, whereas the question of the waiver of other affirmative defenses lacks an explicit textual basis in Rule 12(h) and typically involves more of a balancing test (fair, quick, and inexpensive determination of every action versus prejudice of a delayed motion), giving the district court greater flexibility. Wright & Miller §§ 1278, 1394. One could argue that Rule 15(b) has been applied to Rule 8(c) general affirmative defenses because of this greater flexibility on the issue of the waiver of general affirmative defenses, and hence should not be applied to the special affirmative defense of personal jurisdiction governed by the explicit commands of Rule 12(h). It should be noted, however, that Rule 15(b) itself fails to make any such distinction between types of affirmative defenses.

We need not resolve this difficult issue, however, because Red Rocket failed to timely raise the applicability of Rule 15(b) in this Court. Red Rocket never mentioned Rule 15(b) in their briefs to this Court. Instead, Red Rocket first raised the issue at oral argument. An issue not timely raised in the briefs to this Court is waived, and thus the Rule 15(b) argument is waived for purposes of this appeal.

Because Rule 15(b) is waived, our determination of whether Gillespie has waived Red Rocket's waiver of the defense of personal jurisdiction must rest on general waiver considerations outlined above. See *supra* pp. 5-6. Red Rocket has admitted that it failed to raise in a timely fashion the defense of personal jurisdiction, and so we could easily reach and decide this issue without the benefit of a factual record. Other courts have reached the merits of this and other issues where plaintiff failed to raise it below, even though such conduct by plaintiff would normally constitute a waiver of the issue. See, *e.g.*, *Myer v.*

American Dental Association, 695 F.2d 716 (3d Cir. 1982), certiorari denied, 462 U.S. 1106 (defendant waived defense of personal jurisdiction by not timely raising this defense, even though plaintiff never raised this defect in district court); *Pila v. G.R. Leasing*, 551 F.2d 941 (1st Cir. 1977) (defendant waived defense of insufficient service of process by not timely raising this defense, even though plaintiff never raised this defect in district court). However, regardless of our decision on this waiver issue, we still have to decide the issue of personal jurisdiction with respect to Apollo, and that same legal analysis applies with equal force to whether there is personal jurisdiction with respect to Red Rocket. Given our analysis below of the personal jurisdiction issue, even if we decided that Gillespie has waived Red Rocket's pleading defect, the outcome of the personal jurisdiction issue is no different. We therefore reach the merits of the personal jurisdiction issue with respect to both defendants.

III

A federal district court in a diversity case has personal jurisdiction over a non-consenting, nonresident defendant if and only if a court of the state in which the district court is sitting would have such jurisdiction (in our case Wisconsin). *Afram Export Corp. v. Metallurgiki Halypo. S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985); *Deluxe Ice Cream C. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1212 (7th Cir. 1985). The determination of whether a Wisconsin court would have jurisdiction over a non-consenting, nonresident defendant is a two-step process. The first question is whether defendant is subject to jurisdiction under an applicable Wisconsin state long-arm statute. If not, then there is no jurisdiction, and the inquiry is at an end. If the answer to the first question is yes, however, then the Wisconsin court must determine whether the exercise of jurisdiction under the long-arm statute does not run afoul of the due process requirements of the Fourteenth Amendment. *Matter of All-Star Ins. Corp.*, 110 Wis. 2d 72, 76, 327 N.W.2d 648, 650 (Wis. 1983). A district court

sitting in diversity must not only ask these same two questions, but should ask them in the same order, since it is obviously preferable to decide a question on statutory rather than constitutional grounds.

In examining the statutory question, the first issue is whether Wisconsin intended to restrict personal jurisdiction over nonresident defendants above and beyond the restrictions imposed by due process. The due process requirements are merely the minimum rights possessed by nonresident defendants, and a state is of course free to provide such defendants with greater rights. See, *e.g.*, *Cook Associates, Inc. v. Lexington United Corp.*, 87 Ill. 2d 190, 197-198, 429 N.E.2d 847, 850 (1981) ("the boundaries or limits under [the Illinois] statute are not to be equated with the 'minimum contacts' test under the due process clause");[1] *George v. Strick Corp.*, 496 F.2d 10, 12-13 (10th Cir. 1974) (Oklahoma long-arm statute does not extend courts' jurisdiction to the maximum limits permitted by the due process clause). Other states have long-arm statutes that are intended to be co-extensive with the due process clause. See, *e.g.*, *Hedrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355, 1357-1358 (9th Cir. 1983) (Oregon long-arm statute "confers jurisdiction 'to the outer limits' of due process"); *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1083 (5th Cir. 1983) (limits of Louisiana long-arm statute synonymous with those of due process). With this latter type of long-

[1] For many years the Illinois long-arm statute, the first comprehensive long-arm statute and a model for many other states, was viewed as an attempt to exercise jurisdiction to the fullest limits permitted by the Constitution. Wright & Miller § 1068. The Illinois Supreme Court appeared to say precisely this in *Nelson v. Miller*, 11 Ill. 2d 378, 389, 143 N.E.2d 673, 679 (1957). Yet in recent cases, the Illinois Supreme Court has backed way from this statement, and has said that the statute will no longer necessarily be construed as co-extensive with due process requirements. See *Froning & Deppe, Inc. v. Continental Illinois*, 695 F.2d 289, 295 (7th Cir. 1982) (Eschbach, J., concurring) (cites pertinent recent Illinois Supreme Court cases).

arm statute, the first step becomes superfluous, and a court need address only the due process requirements. *Bean Dredging Corp.*, 744 F.2d at 1083; *Hedrick*, 715 F.2d at 1357-1358.

In the instant case, the relevant long-arm statute is Wis. Stat. § 801.05(4) (1977), which provides in pertinent part that:

> 801.05 PERSONAL JURISDICTION, GROUNDS FOR GENERALLY
>
> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:
>
> * * *
>
> (4) LOCAL INJURY: FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:
>
> (a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or
>
> (b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

The district court summarily concluded that "arguably, the statute applies," and then proceeded to step two and the relevant due process considerations. Defendants briefly argue that the state statute is not met in this case, though the arguments they raise could easily be applied to the due process requirements.

Asserting personal jurisdiction over defendants is consistent with the language of Wis. Stat. § 801.05(4); the injury occurred in Wisconsin, and as our due process analysis below demonstrates the fireworks were consumed within Wisconsin in the ordinary course of trade. How-

ever, we need not linger over the construction of this statute, in view of our decision that the reach of Wis. Stat. § 801.05(4) is intended to be co-extensive with the requirements of due process. The Wisconsin Supreme Court has practically said as much with respect to the statute's reach. *Stevens v. White Motor Corp.*, 77 Wis. 2d 64, 74, 252 N.W.2d 88, 93 (Wis. 1977) ("The various jurisdictional bases [defined in Wis. Stat. § 801.05] were intended by the legislature to be substantially congruent to the field in which jurisdiction may be exercised consistently with modern notions of due process"); *Vermont Yogurt Co. v. Blanke Baer Fruit and Favor Co.*, 107 Wis. 2d 603, 321 N.W.2d 315, 318 (Wis. App. 1982) (quoting from Wisconsin Supreme Court cases, "the statute was intended to provide for the exercise of jurisdiction over nonresident defendants to the full extent consistent with the requirements of due process of law"). The Wisconsin Supreme Court has also described the statute as an attempt to codify the constitutionally imposed rules regarding minimum contacts. *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596, 599 (Wis. 1981). Accordingly, this Court will proceed directly to step two to analyze whether the due process requirements were met in this case.

IV

The due process clause requires that in order to assert specific jurisdiction[2] over a non-consenting, nonresident

[2] A state exercises "specific jurisdiction" over a defendant when it "exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415 n.8. A state exercises "general jurisdiction" over a defendant when it "exercises personal jurisdiction over a defendant in a suit *not* arising out of or related to the defendant's contacts with the forum." *Id.* at 415 n.9; *Burger King*, 105 S. Ct. at 2182 n.15. The former type of personal jurisdiction is involved in the instant case. See generally Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. Ct. Rev. 77.

defendant, that defendant must have purposefully availed itself of doing business in the forum state. *Burger King Corp. v. Rodriguez*, 471 U.S. ____, 105 S. Ct. 2174, 2182; *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985), certiorari denied, 106 S. Ct. 1642; *Afram*, 772 F.2d at 1362; *Snyder v. Smith*, 736 F.2d 408, 415 (7th Cir. 1985), certiorari denied, 105 S. Ct. 513. Once this purposeful availment has been established, other factors are to be examined to determine whether assertion of personal jurisdiction over defendant comports with "fair play and substantial justice." *Burger King*, 105 S. Ct. at 2184 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320). These requirements of due process are now addressed in that order.

A

In determining whether a defendant has purposefully availed itself of doing business in the forum state, mere foreseeability of causing injury in the forum state is not sufficient for the exercise of personal jurisdiction over defendant. Instead, defendant's conduct and contacts with the forum state must have been such that he should have reasonably anticipated being subjected to suit in the forum state. *Burger King*, 105 S. Ct. at 2183; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295; *Snyder*, 736 F.2d at 415; *Froning*, 695 F.2d at 291. Strictly random or fortuitous contacts are insufficient. *Burger King*, 105 S. Ct. at 2183.

In applying this standard, it is instructive to examine the economic context of the suit at issue. Two types of fact patterns often appear. One pattern is where the seller (plaintiff) is suing a buyer (defendant) in the seller's forum, often over a contract that the buyer has breached. See, *e.g.*, *Afram*; *Madison Consulting Group v. South Carolina*, 752 F.2d 1193 (7th Cir. 1985); *Jacobs/Kahan & Co. v. Marsh*, 740 F.2d 587 (7th Cir. 1984). In this type of situation the buyer often has no other contacts with the seller's forum apart from the particular sale. This single

contract between the seller and the nonresident buyer, without more, is not enough to meet the purposeful availment test. *Burger King*, 105 S. Ct. at 2185; *Aftam*, 772 F.2d at 1362. One contract plus delivery in the seller's forum is also not enough, *Aftam*, 772 F.2d at 1364, *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), but additional contacts with the forum state may well be enough, *Aftam*, 772 F.2d at 1364 (delivery plus inspection in seller's forum is enough); *Jacobs/Kahan*, 740 F.2d at 592 (travel by buyer to seller's forum may be enough).

The equities are different in the second pattern, presented in the instant case, where the buyer (plaintiff) is suing a seller (defendant) in the buyer's forum. In this type of case the seller often sells to buyers in the forum state other than the particular buyer who is suing the seller, so that the contract at issue is but one of many contacts between the seller and the buyer's forum. This issue often arises where, as in the instant case, the seller is a manufacturer or primary distributor who is at the start of a distribution system. In the first fact pattern described above the only benefit the buyer-defendant realizes from the seller's forum state may be a single sale, whereas in the second fact pattern the seller-defendant, particularly if at the head of a distribution network, realizes the much greater economic benefit of multiple sales in distant forums, of which the purchase by the particular buyer who has brought suit is merely one example. A seller, since it realizes this greater economic benefit, may more easily satisfy the purposeful availment test and be sued by a buyer in the buyer's forum than a buyer may be sued by the seller in the seller's forum. See *Aftam*, 772 F.2d at 1363. This is especially true where the seller is at the head of a distribution network and thus even more clearly has "purposefully availed" itself of the economic benefits of selling to buyers in distant forums.[3] *Bean Dredging Corp.*, 744 F.2d at 1083-1085;

[3] The differing implications of these two basic fact patterns help explain the different outcomes in *Lakeside* and *Nelson*.

Hedrick, 715 F.2d at 1357-1359; *Nelson v. Park Industries, Inc.*, 717 F.2d 1120, 1125 (7th Cir. 1983), certiorari denied, 104 S. Ct. 1278. Such a seller, because of intervening levels of distribution, may not have mentally formed a purpose to sell its product to the particular individual buyer who is suing it, but the seller surely has purposefully chosen to sell generally to buyers in the forum state and reaps the economic benefit of doing so. A seller at the head of a distribution network thus satisfies the requisite foreseeability of due process where it "delivers its products into the stream of commerce with the expectation that [these products] will be purchased by consumers in the forum state." *Burger King*, 105 S. Ct. at 2182 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-298); see also *Keeton v. Hustler Magazine*, 465 U.S. 770, 779, 781; *Honeywell v. Metz Apparatwerke*, 509 F.2d 1137, 1144 (7th Cir. 1985).

The instant case fits well into this second type of fact pattern. Defendants Apollo and Red Rocket are both primary distributors of fireworks in many states, though admittedly not in Wisconsin. Significantly, they both knowingly sell to Capitol, an interim distributor who in turn advertises fireworks nationwide by advertisements in *American Rifleman*. Capitol's advertising is calculated to reach buyers in distant forums, an important factor in determining whether Capitol has purposefully availed itself of the benefits of doing business in the forum state. *World-Wide Volkswagen*, 444 U.S. at 295; *Casas v. Royal Bank of Canada*, 625 F.2d 139, 144 (7th Cir. 1980), *Hardy v. Pioneer Parachute Co.*, 531 F.2d 193, 195 (4th Cir. 1976), cited with approval by this Court in *Neiman v. Rudolf Wolff & Co., Ltd.*, 619 F.2d 1189, 1194 n.6 (7th Cir. 1980), certiorari denied, 449 U.S. 920; *Honeywell*, 509 F.2d at 1144. There is no evidence that the defendants were unaware of this scope of Capitol's sales efforts, and in fact Red Rocket admits that the distributors to whom it sold had the capability of distributing the fireworks into any other number of states. The defendants, being upstream from Capitol in the distribution chain, derived the same

economic benefits from Capitol's wide scope of sales efforts as Capitol did.

The defendants note that Gillespie purchased the fireworks in Minnesota and unilaterally brought them into Wisconsin, where the injury occurred. The argument is that even accepting the above analysis, at most there was sufficient contact with Minnesota but not Wisconsin. We disagree. It is instructive to compare this case to the facts of *World-Wide Volkswagen*, where one of the defendants was a regional distributor of cars in the New York-New Jersey-Connecticut region. In that case, the plaintiff had bought his car in New York, moved to Arizona, and was injured en route to Arizona when his car exploded in Oklahoma. The Supreme Court ruled that the plaintiff suing in Oklahoma lacked personal jurisdiction over the defendant. However, modifying the facts somewhat, if plaintiff had instead bought his car in Atlantic City, New Jersey, and had been injured in West Hartford, Connecticut, in all likelihood he could have then sued the regional distributor in Connecticut, since the injury occurred within the scope of the sales efforts of the regional distributor. It is this modified version of *World-Wide Volkswagen* that most clearly resembles the instant case. Both Wisconsin and Minnesota are within the area into which Capitol purposefully directed its sales efforts, and therefore Gillespie's transfer of the fireworks from Minnesota to Wisconsin is of no legal significance with respect to jurisdiction over defendants.

The defendants attempt to rebut this argument by noting that Capitol's advertisements prohibited the sale of fireworks in states where they were illegal, and that Wisconsin is such a state. However, the prohibition in Capitol's advertisement was apparently never followed by Capitol. Wisconsin does prohibit fireworks, Wis. Stat. § 167.10 (Supp. 1985), but so do many states, including Minnesota, Minn. Stat. §§ 624.20-624.25 (1964 & Supp. 1986), and yet Capitol did not hesitate to ship fireworks to Gillespie in Minnesota. Defendants cannot deny having received the economic benefits of doing business in

states where fireworks are illegal when there is no indication that Capitol's self-imposed prohibition was followed by that firm or its buyers. Since both Apollo and Red Rocket have purposefully availed themselves of doing business in Wisconsin, the first part of the two-part test is met.

B

Turning to the second part of the test, the assertion of personal jurisdiction over the defendants comports with fairness and justice. Several factors justify this result. First, the product was used in Wisconsin. *Bean Dredging Corp.*, 744 F.2d at 1085. Second, the alleged defects surfaced in Wisconsin. *Id.* Third, a Wisconsin resident was injured, and Wisconsin has a compelling interest in regulating the conduct of manufacturers who expose Wisconsin residents to the hazards of defective products. *Id.*; *Hedrick*, 715 F.2d at 1359.

Because Wisconsin has personal jurisdiction over defendants Apollo and Red Rocket, the judgments of dismissal are reversed.[4]

[4] Since Gillespie has not made any arguments regarding the district court's dismissal of Red Rocket's insurer, Cyril James Warrilow, the dismissal of this insurer is affirmed.

BARKER, *District Judge*, concurring in part and dissenting in part.

I concur with the majority's resolution of the "procedural preliminaries" discussed in section II of the majority opinion; however, I respectfully dissent from the reversal of the district court's dismissal of the claims against Apollo and Red Rocket for lack of personal jurisdiction. I believe that allowing those manufacturers to be sued in Wisconsin violates due process.[1]

The majority correctly analyzes the due process inquiry as involving a two step process. First, a court must determine whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Then, "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2184 (1985), *citing International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Because I believe that Apollo and Red Rocket could not reasonably have anticipated being sued in Wisconsin and could never reasonably be found to have "*purposefully* established minimum contacts" in Wisconsin and because I believe that the assertion of personal jurisdiction on the present facts is an unnecessary,

[1] At the outset, I must note that I am not entirely convinced that the facts in this case support a conclusion that the requirements of the Wisconsin long-arm statute are satisfied. There is, minimally, a substantial question as to whether the fireworks were used or consumed within Wisconsin "in the ordinary course of trade." However, because I believe that holding Apollo and Red Rocket to answer this lawsuit in Wisconsin clearly violates due process, I accept the district judge's view that jurisdiction in all likelihood exists under the Wisconsin statute.

unwarranted, and undesirable extension of the jurisdiction of the district court, I would affirm the district court's decision to dismiss the action against both defendants.

In determining whether Apollo and Red Rocket are connected with Wisconsin in such a way that they should reasonably anticipate being haled into court there, it is helpful to consider the guidance recently given by the Supreme Court on the subject of "purposeful availment." In *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985), the plaintiff brought an action alleging that the defendant had breached his franchise obligations by failing to make the required payments at the plaintiff's place of business in Miami, Florida. The defendant, a Michigan citizen and resident, had never been physically present in Florida. However, he had purchased equipment from plaintiff in Florida; he had negotiated the terms of the franchise with plaintiff's Florida office; and, following default, he had engaged in prolonged negotiations by mail and telephone with plaintiff's Florida office.

The Supreme Court first explained that the

> "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state. Thus where the defendant "deliberately" has engaged in significant activities within a state, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 2183-84 (citations omitted). Then, noting the defendant's deliberate efforts to reach out beyond Michigan to negotiate with a Florida corporation for the purchase of a long-term franchise and his acceptance of a 20-year relationship that envisioned continuing and wide-reaching contacts with plaintiff in Florida, the Court concluded that the defendant's contacts could not be viewed as "random," "fortuitous," or "attenuated." The Court further concluded that the defendant's failure to make the required payments to Miami caused foreseeable injuries there. As such, it was reasonable for the defendant to expect to be sued in Florida.

Though *Burger King* involved a determination of the limits of personal jurisdiction over a nonresident defendant who had allegedly breached a contract, the Supreme Court's general explication of the "purposeful availment" requirement is equally applicable to suits in which plaintiffs assert other theories. Several of the cases cited by the Court in support of its explication involved noncontractual claims. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (torts); *Kulko v. California Superior Court*, 436 U.S. 84 (1978) (domestic relations).

In the present case, the contacts between Wisconsin and the alleged tortfeasors, Apollo and Red Rocket, clearly do not suggest the requisite purposeful availment necessary to satisfy due process.

Assuming as we do that both Apollo and Red Rocket supplied the fireworks to Capitol that caused the injuries to Giotis in Wisconsin, the fact that the fireworks were in Wisconsin at all was the result of the unilateral activity of a third person, namely, Malcolm Gillespie, Jr. in taking the fireworks there. Neither Apollo nor Red Rocket distributed fireworks in Wisconsin. In addition, there is no evidence in the record that Capitol distributed fireworks in Wisconsin. In fact, no sale at all occurred in Wisconsin. Capitol's nationwide advertising, which was the defendants' only possible "purposeful" contact with Wisconsin does not, in itself, constitute an action by the de-

fendant capable of being construed as a contact which "create[s] a 'substantial connection' with the forum state." *See Burger King*, 105 S.Ct. at 2184.

It was Gillespie's decision to transport and act of transporting the fireworks to a party in Wisconsin that resulted in there being a connection between the defendants and Wisconsin. Apollo and Red Rocket did not deliberately engage in any significant activities in Wisconsin. Neither by their express intentions nor through their acts have Apollo and Red Rocket created any "continuing obligations" between themselves and Wisconsin residents. All that can be established is that they deliberately chose to sell fireworks to a distributor in Illinois who advertises nationwide. Apollo and Red Rocket have done nothing to avail themselves of the privilege of conducting business in Wisconsin, they have had no contacts other than those random and fortuitous contacts created by Malcolm Gillespie, and they had no reason to anticipate being haled into court there. In my opinion due process dictates that they should not be haled into court there.

In support of its contrary conclusion that the due process clause is not violated by allowing Apollo and Red Rocket to be sued in Wisconsin, the majority relies heavily upon a comparison of the facts in this case to a modified version of the facts in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In attempting to determine if *World-Wide Volkswagen* controls the outcome of this case, the majority creates a factual scenario in which the plaintiff bought his car in Atlantic City, New Jersey, was injured in West Hartford, Connecticut, and sued a regional distributor of that car in Connecticut, suggesting that those circumstances would most clearly resemble the facts in the present case and concluding under those facts and due process standards, that the suit could properly be brought in Connecticut.

At the risk of over-extending the majority's analysis, let me offer what I believe to be a more accurate modification of the *World-Wide Volkswagen* facts as applied to

this case. Assume a person purchased from a New Jersey distributor a car which had been manufactured in Michigan. From there, the purchaser drove the car to his friend's house in Connecticut. While the purchaser was driving the car in Connecticut, it malfunctioned and injured the friend. The friend then filed a suit in Connecticut against the Michigan manufacturer. This scenario, I believe, more closely resembles the present case for the reason that in this scenario, as in the instant case, the plaintiff was not the purchaser of the allegedly defective product and the defendant was not the distributor, but was instead the manufacturer of the product.

From this set of facts, it is apparent that, pursuant to *World-Wide Volkswagen*, a court in Connecticut would not have personal jurisdiction over the defendant. The manufacturer of the product cannot be deemed to have purposefully positioned itself in a state where an injury occurs when that state where the injury occurs is other than the place where the product was purchased, and the injury is suffered by a friend of the actual purchaser of a product. An injury under these circumstances does not give rise to sufficient contacts by the alleged tortfeasor with the place of the injury to permit personal jurisdiction over him. In fact, it is difficult to imagine contacts which could be more random and fortuitous than the defendants' contacts with Wisconsin which occurred only as a result of the independent decision of Gillespie to transport the fireworks into Wisconsin. The manufacturers and distributors of the fireworks did not encourage or solicit that decision by Gillespie, they did not participate in that decision, nor did they derive any economic benefit from that decision. It was a decision made entirely of Gillespie's own volition. Yet, the majority holds that Apollo and Red Rocket can be sued in such a place and that their constitutional entitlement to due process is not violated or otherwise compromised by requiring them to defend in a forum over which they had virtually no say-so or choice.

I believe the court's holding today will effectively abolish any due process restrictions on personal jurisdic-

tion over manufacturers and distributors of moveable products. Indeed, the holding suggests that, because manufacturers and primary distributors are at the head of the distribution system, they should reasonably expect to be sued in any jurisdiction into which a purchaser may transport their product.

The majority has cited a case, decided by another panel of this court, which addresses personal jurisdiction in the context of a moveable product. *See Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1125 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1278 (1984). In *Nelson*, plaintiff, who was a minor, sought recovery for burns sustained when the shirt she was wearing ignited after contact with a cigarette lighter flame. The shirt was manufactured in Hong Kong, purchased by a purchasing agent in Hong Kong on behalf of the retail seller, and sold at the retailer's store in Wisconsin. The district court granted the manufacturer's and the purchasing agent's motions to dismiss for lack of personal jurisdiction. This court reversed. Although the case supports a conclusion that sellers at the head of a distribution network *may* more easily satisfy the "purposeful availment" test, it is distinguishable on its facts from the present case, as explained below, and does not compel us to conclude that personal jurisdiction exists here.

In *Nelson*, following the general holding that the relevant scope of the foreseeable market served by manufacturers and primary distributors is often broader for them than it is for sellers further down the stream of commerce, the panel recognized that the crucial inquiry remained: whether under that distribution system it could be said that the movants' conduct and their connection with Wisconsin were such that they should reasonably have anticipated being haled into court there. In its analysis, the court focused primarily on whether the movants were aware that they were indirectly serving and deriving economic benefits from the national retail market established by the retailer. After finding sufficient evidence in the record to establish such knowledge, the court

concluded that, on that basis, the movants should have reasonably anticipated being haled into court in a forum where the distribution system brought a shirt that allegedly caused injury.

The *Nelson* court's ability to find evidence of the defendants' knowledge of the distribution scheme distinguishes it from the facts of the present case. In the case at bar, there is no evidence in the record that the defendants were aware of the scope of Capitol's sales efforts, and it is my view that without such evidence, Apollo and Red Rocket should not be held to answer in a suit that was filed in a forum into which their product was randomly or fortuitously transported.

Recognizing the significance of the defendants' knowledge of the distribution scheme as a factor in determining whether the defendants should reasonably anticipate a lawsuit in a given forum, the majority opinion holds: "[T]here is no evidence that the defendants were unaware of [the] scope of Capitol's sales efforts, and in fact Red Rocket admits that the distributors to whom it sold had the capability of distributing the fireworks into any other number of states." However, in reaching this conclusion, the majority erroneously shifts the burden of establishing jurisdiction to the defendants, requiring them to prove their state of knowledge concerning the scope of Capitol's sales efforts at the time of the alleged injury.

A plaintiff has the burden of establishing jurisdiction. *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971). Since there is no evidence that the defendants were aware or unaware of the scope of Capitol's sales efforts, the only legitimate inference we should fairly draw is that there is no factual basis to extend jurisdiction over the defendants.

Finally, Red Rocket's admission regarding its customers' distribution capability is, at best, ambiguous, since many distributors are *capable* of selling products in any state, yet choose to sell only in specified regions. Therefore, I am unwilling to conclude that the "admission" is suffi-

cient evidence of Red Rocket's knowledge of Capitol's distribution territory such that Red Rocket should be subject to a lawsuit in any state within that territory. In any event, the admission cannot be attributed to Apollo; therefore, no evidence exists in the record regarding Apollo's knowledge.

For all of the foregoing reasons, I respectfully dissent from section IV of the majority opinion and would affirm the district court's dismissal.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SPIRO GIOTIS,

Plaintiff,

vs.

JOHN HEFFINGER, RED ROCKET FIREWORKS, SCHNEITTER FIREWORKS AND IMPORTING COMPANY, MALCOLM GILLESPIE, APOLLO OF THE OZARKS, INC., KENT MANUFACTURING, FIREMAN'S FUND INSURANCE COMPANY, NORTHWESTERN NATIONAL INSURANCE COMPANY, SAFECO INSURANCE COMPANIES, LONGHORN MANUFACTURING COMPANY, NEW JERSEY FIREWORKS, and CERTAIN UNDERWRITERS AT LLOYDS OF LONDON,

Defendants.

MALCOLM GILLESPIE,

Third-Party
Plaintiff,

vs.

CAPITOL FIREWORKS COMPANY and JOHN HEFFINGER, JR.,

Third-Party
Defendants.

Civil Action No. 82-C-1596

DECISION AND ORDER

Currently pending in this action are several motions: (1) the motion of Longhorn Manufacturing Company for dismissal for lack of personal jurisdiction, or alternatively, for summary judgment; (2) the motion of Certain Underwriters At Lloyds of London, Cyril James Warrilow, Lead Underwriter, for summary judgment; (3) the motion of New Jersey Fireworks Manufacturing Company for dismissal for lack of personal jurisdiction; (4) the motion of New Jersey Fireworks Manufacturing Company for summary judgment; (5) the motion of Apollo of the Ozarks, Inc. for dismissal for lack of personal jurisdiction, or alternatively, for

summary judgment; (6) the motion of Schneitter Fireworks and Importing Company for dismissal of the complaint for failure to state a claim; and (7) the motion of Schneitter Fireworks and Importing Company for summary judgment.

This case grows out of an injury Spiro Giotis suffered on July 4, 1982, from allegedly defective fireworks set off at the home of John Heffinger in Hartland, Wisconsin. Prior to that date, Malcolm Gillespie, Jr. purchased fireworks from Capitol Fireworks Company, an Illinois corporation, by completing a mail order form that appeared in a magazine advertisement. Capitol advertised that the fireworks would not be sold "where prohibited by law." The mail order form provided that as a condition of sale the buyer must comply with the laws of the state of

destination. Capitol shipped the fireworks to Gillespie in White Bear Lake, Minnesota.

Gillespie then brought the fireworks with him to the home of John Heffinger, Sr. in Hartland, Wisconsin, where on July 4, 1982, they were discharged by Gillespie and others who had come to a party at the Heffinger home. It was at that time that one of the fireworks allegedly struck and injured Giotis.

Giotis filed this lawsuit and in his Second Amended Complaint sets forth various theories of recovery from John Heffinger, Malcolm Gillespie, various producers of fireworks, and certain of their insurance companies.

The motions of Schneitter Fireworks and Importing Company are not opposed, and are therefore granted. Schneitter is dismissed from this action.

Apollo, New Jersey, and Longhorn have moved to be dismissed from the action for lack of personal jurisdiction.

Apollo is a Missouri corporation engaged in the manufacture and distribution of Class C fireworks. It has a retail outlet combined with a gas station and general store in Stanton, Missouri. In 1982, the owner of Capitol Fireworks Company, from whom Gillespie bought his fireworks, purchased most of his inventory from Apollo. His usual sources for fireworks were Apollo, Red Rocket Fireworks, and Schneitter Fireworks and Importing Company.

New Jersey is a Maryland corporation which manufactures two items with the same name as two of the items purchased by Gillespie: "Devil Among the Tailors" and "Battle in the Clouds." New Jersey claims, however, to have no proprietary

interest in the names of those particular fireworks. Other than those two items, no evidence indicates that any of New Jersey's products have ever found their way to Wisconsin.

Longhorn is a New Mexico corporation, which manufactures a device called the 15 Shots All In One, which is one of the items Gillespie purchased from Capitol. In 1982, Longhorn did not sell its products directly to Capitol, and in fact has not sold to Capitol since at least 1976.

Plaintiff Giotis and third-party plaintiff Gillespie claim that jurisdiction exists over these defendants under Wisconsin's long-arm statute, § 801.05(4) Local Injury Foreign Act. Arguably, the statute applies to all three defendants. However, the ultimate question must be whether the exercise of

jurisdiction under that statute is consistent with due process requirements.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) and Nelson by Carson v. Park Industries, Inc., 717 F.2d 1120 (7th Cir. 1983) are on point. In World-Wide Volkswagen, the "chain of distribution" of an Audi automobile, which was involved in an accident in Oklahoma, was as follows: manufacturer to regional distributor to retailer to New York buyer to accident in Oklahoma. The Oklahoma court did not have jurisdiction over the regional distributor or the New York retailer. In Nelson, the chain was as follows: manufacturer (in Hong Kong) to distributor (also in Hong Kong) to retailer to Wisconsin buyer injured in Wisconsin. The court determined that jurisdiction existed over both the manufacturer and

the distributor.

Certain statements from those cases are relevant here. In World-Wide Volkswagen, the court stated:

> "Hence if the sale of a product of a manufacturer or a distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. At 297."

Amplifying the distinction being drawn in the Volkswagen case, the Seventh Circuit Court of Appeals in Nelson, supra, states:

> "The World-Wide Volkswagen court's recognition of a distinction among the various entities that might compose a distribution system or a product is pivotal to the decision in this case. The two defendants in World-Wide

Volkswagen who are not amenable to Oklahoma jurisdiction were at the end of the automobile's distribution system. The scope of the foreseeable market served by those defendants and of the benefits those defendants derived from the sale of the product was narrow. In contrast, the relevant scope is generally broader with respect to manufacturers and primary distributors of products who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market." At 1125 and 1126.

In the present case, Apollo is a manufacturer and distributor who sold to

another distributor, Capitol, who sold to a Minnesota resident, Gillespie, who took the fireworks to Wisconsin where the injury occurred. New Jersey is a manufacturer whose products allegedly found their way -- apparently through Capitol -- to Gillespie and thus to Wisconsin. The record is bare as to what or how many fireworks New Jersey ever sold to Capitol. Longhorn is the manufacturer of one item Gillespie bought from Capitol. Longhorn does not sell directly to Capitol, but as the fireworks were all purchased from Capitol, Longhorn's product was somehow among Capitol's inventory.

Whether any of these manufacturers is subject to jurisdiction in Wisconsin is a difficult question. Because each defendant is a manufacturer, presumably it is somewhat easier for plaintiff to

establish his prima facie case that jurisdiction exists. However, the fact that there were only two items even possibly manufactured by New Jersey and only one by Longhorn would -- all other considerations aside -- make it fundamentally unfair for a court sitting in Wisconsin to exert jurisdiction over these two companies. There is no evidence that either New Jersey or Longhorn sold its products to Capitol. It is therefore impossible to infer that either company intended its products to be distributed in the midwest, say nothing of Wisconsin. Furthermore, plaintiff's theory regarding which device caused the injury is not clearly defined. To hold New Jersey and Longhorn in this case would be especially unfair.

Apollo, on the other hand, is viewed as the culprit manufacturer -- if not

clearly by Giotis -- at least by Gillespie and Heffinger. Furthermore, the bulk of the fireworks Gillespie purchased from Capitol were, for purposes of this motion, more than likely manufactured by Apollo. Apollo's contacts with Wisconsin are different from the other manufacturers.

The question is whether the fact that more of Apollo's product found its way into Wisconsin is sufficient to allow the exercise of jurisdiction. Even though it manufactured more of the fireworks sold to Gillespie, a fireworks manufacturer/gas station/food store on a roadside in Missouri is hardly capable of being equated with a manufacturer of automobiles sold throughout the United States and other countries. In addition, the Nelson court at least hinted that the manner in which the products appeared in

the forum state may in some cases be significant:

> "World-Wide Volkswagen is also different because the allegedly defective product here not only caused injury in the forum, but it was also purchased there." At 1126.

There is no evidence that any of Apollo's products were purchased by Wisconsin residents and mailed to Wisconsin. The only products of which evidence exists were mailed to Minnesota. Gillespie brought them with him to Wisconsin. He could as well have taken them to Maine or California. The chance that a purchaser will "distribute" the product of a basically local manufacturer to far-off places is not sufficient to allow a court to exercise jurisdiction over that manufacturer.

IT IS THEREFORE ORDERED that the motion of Longhorn Manufacturing Company

for dismissal for lack of personal jurisdiction is GRANTED.

IT IS FURTHER ORDERED that the insurer for the Longhorn Manufacturing Company Certain Underwriters at Lloyds of London, et al. is also DISMISSED.

IT IS FURTHER ORDERED that the motion of New Jersey Fireworks Manufacturing Company for dismissal for lack of personal jurisdiction is GRANTED.

IT IS FURTHER ORDERED that the motion of Apollo of the Ozarks for dismissal for lack of personal jurisdiction is GRANTED.

IT IS FURTHER ORDERED that the status conference currently scheduled for January 8, 1985, at 8:30 a.m., will be held as scheduled.

Dated at Milwaukee, Wisconsin, this 21st day of December, 1984.

BY THE COURT:

_____

Terence T. Evans,
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SPIRO GIOTIS,

Plaintiff,

vs.

JOHN HEFFINGER, RED ROCKET FIRE-WORKS, SCHNEITTER FIREWORKS AND IMPORTING COMPANY, MALCOLM GILLESPIE, APOLLO OF THE OZARKS, INC., KENT MANUFACTURING, FIREMAN'S FUND INSURANCE COMPANY, NORTHWESTERN NATIONAL INSURANCE COMPANY, SAFECO INSURANCE COMPANIES, LONGHORN MANU-FACTURING COMPANY, NEW JERSEY FIRE-WORKS, and CERTAIN UNDERWRITERS AT LLOYDS OF LONDON,

Defendants.

MALCOLM GILLESPIE,

Third-Party
Plaintiff,

vs.

CAPITOL FIREWORKS COMPANY and JOHN HEFFINGER, JR.,

Third-Party
Defendants.

Civil Action No. 82-C-1596

DECISION AND ORDER

Before me is the motion of Red Rocket Fireworks for dismissal or for summary judgment. In the motion for dismissal, the contention is that the court lacks personal jurisdiction over Red Rocket.

The background facts of this case have been set forth in my Decision of December 21, 1984, in which various other manufacturers and distributors of fireworks were dismissed from the action. I will not repeat those facts here, nor will I repeat the discussion of the law which I consider applicable to a decision on a personal jurisdiction motion in this case.

Red Rocket is a Missouri corporation with three warehouses located in two

states -- Missouri and Louisiana. Red Rocket distributes fireworks, most of which come directly from the manufacturers in China. In turn, 85-90% of Red Rocket's sales are to other distributors. Red Rocket also sells fireworks directly to consumers through gift shops located at their warehouses. Red Rocket has never been authorized or licensed to do business in Wisconsin nor has it solicited sales in Wisconsin.

The fireworks that Malcolm Gillespie ordered from Capitol Fireworks Company included "parachute searchlights." Capitol's normal source of supply for night parachute shells was Red Rocket, Apollo of the Ozarks, or Schneitter Fireworks. Raymond Steskel of Capitol had ordered night and day parachute shell fireworks from Red Rocket on June 11, 1982. He is unable to state whether he received that

order from Red Rocket by June 14, 1982, the date on which he filled Gillespie's order.

In other words, to use the sort of analysis that was used in my December 21, 1984 Decision, Red Rocket is a distributor who sold fireworks to another distributor, Capitol, who may have in turn sold some of the products it received from Red Rocket to Gillespie, a Minnesota resident, who in turn took the fireworks to Wisconsin, where the injury to Spiro Giotis occurred. Under the principles of law set forth in the earlier decision, I find that this court lacks personal jurisdiction over Red Rocket Fireworks.

IT IS THEREFORE ORDERED that the motion of Red Rocket Fireworks for dismissal for lack of personal jurisdiction is GRANTED.

IT IS FURTHER ORDERED that a status conference will be held in this action on September 3, 1985, at 9:15 a.m. If plaintiff's counsel would prefer to do the conference over the phone he should call me and it will be changed to a conference call.

Dated at Milwaukee, Wisconsin, this 11th day of July, 1985.

BY THE COURT:

_____

Terence T. Evans,
United States District
Judge

APPENDIX D

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 4, 1986

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. SARAH EVANS BARKER, District Judge*

Nos. 85-1835, 85-2206, 85-2584, and 85-2656

SPIRO GIOTIS, Plaintiff-Appellant,

vs.

APOLLO OF THE OZARKS, INC., RED ROCKET FIREWORKS, a corporation, and CYRIL JAMES WARRILOW, Lead Underwriter,

Defendants-Appellees,

and

MALCOLM GILLESPIE, Defendant and Third-Party Plaintiff-Appellant,

vs.

CAPITOL FIREWORKS COMPANY,)
and JOHN HEFFINGER, JR.,)
)
Third-Party Defendants.)

Appeal From the United States District Court for the Eastern District of Wisconsin

No. 82 C 1596
TERENCE T. EVANS, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of dismissal of appellees Apollo and Red Rocket are REVERSED, and, since no argument was made regarding the dismissal of Red Rocket's insurer Warrilow, the dismissal of this insurer is AFFIRMED, in accordance with the opinion of this Court filed this date.

Costs on appeal are awarded equally to appellants.

---

* The Honorable Sarah Evans Barker, District Judge for the Southern District of Indiana, is sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 27, 1986

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. SARAH EVANS BARKER, District Judge*

Nos. 85-1835, 85-2206, 85-2584, and 85-2656

SPIRO GIOTIS,

Plaintiff-Appellant,

vs.

APOLLO OF THE OZARKS, INC., et al.,

Defendants-Appellees,

and

MALCOLM GILLESPIE,

Defendant and Third-Party Plaintiff-Appellant,

vs.

CAPITOL FIREWORKS COMPANY,

et al.,)
)
Third-Party Defendants.)

Appeal From the United States
District Court for the Eastern
District of Wisconsin

No. 82 C 1596
Terence T. Evans, Judge.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing en banc filed in the above-entitled cause by Apollo of the Ozarks, Inc. and Red Rocket Fireworks, no judge of this Court in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

Page 6 of the slip opinion issued

September 4, 1986, is amended by inserting an * after "Court." in line 4 of paragraph 1, and the * footnote will read as follows:

> *While Red Rocket Fireworks' February 28, 1986, Circuit Rule 11 letter cites Rule 15(b) of the Federal Rules of Civil Procedure, that rule only permits the citation of additional authority and not a new argument.

---

* The Honorable Sarah Evans Barker, District Judge for the Southern District of Indiana, is sitting by designation.

JAN 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1097

In The Supreme Court

OF THE

United States

October Term, 1986

APOLLO OF THE OZARKS, INC.,
AND RED ROCKET FIREWORKS,
Petitioners,

v.

SPIRO GIOTIS AND MALCOLM GILLESPIE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT L. ELLIOTT
660 East Mason Street
Milwaukee, WI 53202
(414) 271-5900
Attorneys for Respondent, Malcolm Gillespie

JEROME R. KERKMAN
COOK & FRANKE, S.C.
Of Counsel

QUESTION PRESENTED

May a manufacturer or primary distributor of fireworks be subjected to jurisdiction in Wisconsin, consistent with the due process clause, where that party advertised and sold to customers on the interstate highway system and also knowingly sold to a distributor of fireworks, which directly served the Wisconsin market for sale of its fireworks, the place at which a firework was eventually set-off and caused injury?

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STATEMENT OF THE CASE

Petitioners' statement of the case fails to point out the following. Apollo of the Ozarks, Inc. (Apollo) mainly sold to big wholesalers who in turn sold to others. Petitioners' Appendix at A-3. Red Rocket Fireworks (Red Rocket) sold primarily (85-90% of its sales) to distributors. Petitioners' Appendix at A-3. Red Rocket at one point admitted that the distributors to whom it sold have the capability of distributing the fireworks to any number of states. Petitioners' Appendix at A-13. Apollo and Red Rocket also advertised along their retail outlets along interstate highways. Petitioners' Appendix at A-3.

There is no evidence that Apollo or Red Rocket were unaware of the scope of Capitol Fireworks Company's (Capitol) sales efforts. Petitioners' Appendix at A-13. There is no evidence that Apollo or Red Rocket relied on Capitol's advertisements in American Riflemen which stated it would not sell fireworks where prohibited by law. Petitioners' Appendix at A-14, A-15.

With the above facts, Gillespie accepts for purposes of this petition the petitioners' Statement Of The Case.

REASONS FOR DENYING WRIT

A writ of certiorari should not be granted. The Seventh Circuit's decision does not conflict with a decision of this court, and the issue decided by the Seventh Circuit is in accord with other circuits.

1. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH WORLD-WIDE VOLKSWAGEN.

Apollo and Red Rocket attack the Seventh Circuit's decision as conflicting with the "purposeful availment" requirement of World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Petition at 10-11. Apollo and Red Rocket conclude that since they individually have not "advertised or engaged in any other type of business activity in Wisconsin"

the purposeful availment test has not been met. Petition at 13-14. They mischaracterize the Seventh Circuit's decision as "holding any manufacturer subject to suit in any state where its product causes injury." Petition at 15.

As Apollo and Red Rocket correctly point out, World-Wide Volkswagen requires the defendant corporation to purposefully avail itself of doing business in the forum state. Petition at 10; 444 U.S. at 297. The defendant's contacts with the forum state must be assessed to determine if that defendant should have reasonably anticipated being subjected to suit in the forum State. Id.

Apollo and Red Rocket attempt to characterize their contacts as being

the same as the regional distributor and retail dealer in World-Wide Volkswagen who limited the market served to New York, New Jersey and Connecticut. Petition at 14. In World-Wide Volkswagen, this court found that the regional distributor and retail dealer did not purposefully avail themselves of doing business in Oklahoma.

Apollo and Red Rocket however later admit a distinction between themselves and the defendants in World-Wide Volkswagen. Petition at 15. This distinction is fatal to their argument as is readily apparent from a review of the facts.

Apollo and Red Rocket sold to Capitol, a retail distributor which advertised nationwide in the American

Rifleman magazine. Capitol's advertising was calculated to reach buyers in distant forums such as Wisconsin. Petitioners' Appendix at A-13. The Seventh Circuit found Capitol purposefully directed its sales efforts to Wisconsin. Petitioners' Appendix at A-13, A-14. Apollo and Red Rocket do not disagree with this finding.

It is undisputed that Apollo and Red Rocket are primary distributors who knowingly sold to Capitol. Petitioners' Appendix at A-13. As primary distributors upstream from Capitol in the distribution system, the Seventh Circuit held Apollo and Red Rocket to the same expected scope of distribution as Capitol. Petitioners' Appendix at A-13, A-14.

Contrary to the assertions of Apollo and Red Rocket, the holdings of this court do not require that the head of the distribution system serve directly the market of or itself have physical ties with the forum State. World-Wide Volkswagen, 444 U.S. at 295 (efforts to indirectly serve the market of the forum State through others for its products are sufficient); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985) (no physical ties are necessary). It is sufficient that Apollo and Red Rocket were the head of a distribution system which advertised in and directed its sales efforts to a broad market which included Wisconsin. The Seventh Circuit merely held that a manufacturer is subjected to suit in any state its product causes injury and

which was within the expected scope of distribution. This is exactly what this court ruled in World-Wide Volkswagen. 449 U.S. at 298-99.

2. THE RATIONALES OF THE SEVENTH CIRCUIT DO NOT CONFLICT WITH DECISIONS OF THIS COURT.

Apollo and Red Rocket cite two rationales which supposedly conflict with World-Wide Volkswagen. First, they argue that World-Wide Volkswagen requires a direct "economic benefit earned by the sale of goods that are eventually used in Wisconsin." Petition at 18-19. Second, they argue the Seventh Circuit did not determine their amenability to jurisdiction based upon their actions and expectations but upon some other person. Petition at 20.

Apollo and Red Rocket base their first argument on the following language from World-Wide Volkswagen:

> . . . financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. 444 U.S. at 299.

Petition at 19.

Apollo and Red Rocket do not have a "collateral relation" to Wisconsin as referred to in World-Wide Volkswagen. The financial benefits to the regional distributor and retail dealer as cited in World-Wide Volkswagen were the ability to use the product in Oklahoma and have the product serviced there. 444 U.S. at 298. This court held:

> . . . whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of in personam jurisdiction over them.

444 U.S. at 299.

Here, Apollo and Red Rocket derive direct economic benefits from being at the head of an interstate distribution system and purposefully selling to other distributors such as Capitol which sought to serve the Wisconsin market among other states for its sales. Apollo and Red Rocket cannot deny that they had benefitted from Capitol's efforts to serve a broad interstate market which included Wisconsin.

> [W]here individuals "purposefully derive benefit"

> from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

Burger King Corp., 471 U.S. at 473-74.

The benefits indirectly received from Wisconsin through Capitol's sales efforts does not constitute a collateral relation to Wisconsin, but an effort to indirectly serve a broad market which included Wisconsin.

> [A] corporation "purposely avails itself of conducting business within the forum State." . . . if it indirectly [serves] the market for its product in [the forum State]. (Emphasis supplied.)

World-Wide Volkswagen, 444 U.S. at 297.

Apollo and Red Rocket's second argument that the Seventh Circuit did not consider their individual actions and expectations again misses the mark. Petitioners' Appendix at 19-20. Apparently, they assert they had no reasonable expectation their products would be consumed in Wisconsin which would put them on notice of their amenability to suit there. Burger King Corp., 471 U.S. at 472; World-Wide Volkswagen, 444 U.S. at 297; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984). Presumably, if Apollo and Red Rocket had reasonable expectations of being hailed into Wisconsin, they could have acted "to alleviate the risk of burdensome litigation by insurance, passing the expected costs on to customers, or, if the risks [where] too

great, severing [their] connection with [Wisconsin]." World-Wide Volkswagen, 444 U.S. at 297.

Apollo and Red Rocket's actions show they did nothing to alleviate the risk of burdensome litigation but increased it. They advertised along interstate highways in an effort to sell their fireworks to residents of any state passing through. Petitioners' Appendix at A-3. They sold their fireworks primarily to other distributors who sold the fireworks to a national market, including Wisconsin.

Apollo and Red Rocket's professed lack of actual knowledge of the distribution system does not insulate them from defending actions in forums included in the national market of the

distribution system. They cannot blindly put their products into the stream of commerce and then wield the due process clause as a territorial shield to avoid obligations which they have voluntarily assumed by selling their products to national distributors. Burger King Corp., supra at 10-11.

3. THERE IS NO CONFLICT WITHIN THE CIRCUITS.

Apollo and Red Rocket conclude that the circuits "have clearly had difficulty applying World-Wide Volkswagen to manufacturers and primary distributors." Petition at 28. Apollo and Red Rocket do not cite any cases in which the holdings conflict. Rather, they attempt to manufacture a conflict by arguing that the analyses conflict.

The "conflicting analyses" are easily reconciled, leaving their conclusion without a basis.

Apollo and Red Rocket argue one line of cases focuses on the manufacturer or primary distributor's knowledge while the other line of cases focuses on the economic benefits to the manufacturer or primary distributor. Petition at 23-24. These two analyses are part of the courts' determinations of the expected scope of distribution system below the seller as required by World-Wide Volkswagen. 444 U.S. at 297-98; Petition at 22.

This requirement is derived from the "foreseeability that is critical to the due process analysis." World-Wide Volkswagen, 444 U.S. at 297. Foreseeability is measured by whether

the manufacturer or distributor "should reasonably anticipate being hailed into court there." Id. This court has found that the defendant should reasonably anticipate being hailed into the forum State if it indirectly serves the forum State's market.

> . . . if the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id.

Efforts to serve, directly or indirectly, the forum State's market are measured by economic benefits

received. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) ("[the activities of the distributor] resulted in a large volume of interstate business. . . ."); Keeton v. Hustler Magazine, Inc., 465 U.S. at 781 ("where . . . respondent . . . has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being hailed into court there. . . ."); Burger King Corp., 471 U.S. at 473 ("Moreover, where individuals 'purposefully derive benefit' from their interstate activities. . . .").

This court has also found the defendant should reasonably anticipate being hailed into the forum State if it had actual knowledge of its connection with the forum State. Calder v. Jones,

465 U.S. 783, 789-90 (1984) ("And [petitioners] knew that the brunt of that injury would be felt by respondent in the [forum] State. . . .").

Contrary to Apollo and Red Rocket's position, this court has consistently "rejected the notion that personal jurisdiction might turn on 'mechanical' tests. . . ." Burger King Corp., 471 U.S. at 478, citing International Shoe, 326 U.S. at 319. Rather, each defendant's contacts with the forum State must be assessed individually. Calder, 465 U.S. at 790.

In the cases cited by Apollo and Red Rocket, the courts are individually assessing the contacts of each case and not applying a rigid or mechanical rule. Oswald v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980) (the

court found the distributor knew distribution chain and "made efforts to serve indirectly the market for its product in Texas."); Noel v. S.S. Kressge Co., 669 F.2d 1150, 1155 (6th Cir. 1982) (while the court found the distributor was "familiar" with the distribution system, it also found that the distributor "at least indirectly sought to serve the market for its products in [the forum State]."); Plant Food Coop v. Wolfkill Feed & Fertilizer, 633 F.2d 155, 159 (9th Cir. 1980) ("This contact with [the forum State] was voluntary and financially beneficial to [the distributor]." (Emphasis added.)).

Consequently, there is no conflict as suggested by Apollo and Red Rocket but merely the assessment individually

of the contacts of each case to find whether the defendants should have "reasonably anticipate[d] being hailed into court there." World-Wide Volkswagen, 444 U.S. at 297. Certainly this court is not going to require a determination of the seller's reasonable expectation to rely solely on the seller's professed actual knowledge.

4. APOLLO AND RED ROCKET OVERSTATE THE IMPACT OF THE SEVENTH CIRCUIT'S DECISION.

Apollo and Red Rocket argue that the Seventh Circuit's decision abolishes due process restrictions, effectively preventing manufacturers and distributors from limiting their exposure. Petition at 28-29. This is wholly unfounded.

Manufacturers and distributors limiting their sales to users within identifiable territories will not be affected. If Apollo and Red Rocket only sold to the end users who were Missouri residents from their stores in Missouri, there is nothing in the Seventh Circuit's decision to suggest they would have been amenable to suit in Wisconsin. Or, if Apollo and Red Rocket had sold to distributors and relied on the distributors' limited sales territory, restricted to a number of states which excluded Wisconsin, they would not have been amenable to suit in Wisconsin.

But here Apollo and Red Rocket injected their products into the stream of commerce to interstate transients and distributors seeking to serve the

market in every state. The Seventh Circuit correctly held Apollo and Red Rocket to the scope of the sales efforts of Capitol which was below them on the distribution scheme. Apollo and Red Rocket which made no effort to limit their exposure but blindly passed their products along cannot insulate themselves from their responsibility. They must account for their actions.

5. THIS CASE WOULD NOT COMPLIMENT ASAHI.

Apollo and Red Rocket argue this case would compliment this court's expected decision in Asahi Metal Industry Co. v. Superior Court, No. 85-693. They cite two insignificant factual differences as a bases for their assertion. First, Asahi involves a component manufacturer with no

control over the eventual distribution of its product, but admitting to having knowledge of the expected scope of distribution. The present case involves a manufacturer and distributor of a finished product, having no control or professed knowledge of the expected scope of distribution. Second, personal jurisdiction Asahi is based upon the place of sale for the defective product while here it is based upon the ultimate use being within the scope of sales efforts.

In World-Wide Volkswagen, this court discussed at length the purposeful availment as it related to foreseeability. Supra at 4. Knowledge of the manufacturer or distributor is only one possible way to fulfill the purposeful availment requirement. Supra at 17.

The second factual distinction is imaginary. Sale and use are not the determining factors. Given the professed lack of knowledge of Apollo and Red Rocket the critical factor is whether the manufacturer or distributor "directly or indirectly" sought to serve the market in the forum State. World-Wide Volkswagen, 444 U.S. at 297.

The factual distinctions will not lend to further development of law through comparison as cases of this court have addressed the distinctions. Supra at 16-17. They will simply show that minimum contacts are measured by the facts of each case, not an inflexible standard, and that this court determines minimum contacts based upon the totality of the circumstances. Supra at 18.

CONCLUSION

Gillespie requests that this court deny the writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 86-1097

In The Supreme Court

OF THE

United States

October Term, 1986

APOLLO OF THE OZARKS, INC.,
AND RED ROCKET FIREWORKS,
Petitioners,

vs.

SPIRO GIOTIS AND MALCOLM GILLESPIE,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents oppose the grant of a writ of certiorari in this matter by arguing that Wisconsin was within the expected scope of distribution of the distributor, Capitol Fireworks Company ("Capitol"). In support of their argument, Respondents state that Petitioners "do not disagree" with the Seventh Circuit's finding that "Capitol purposefully directed its sales efforts to Wisconsin." Brief in Opposition 6.

Petitioners emphatically do disagree with any suggestion that Capitol purposefully directed its sales efforts toward Wisconsin, or that Wisconsin was in any way within Capitol's scope of distribution.

Respondents cannot support their contention. "There is no evidence in the record that even a single item manufactured or sold by Apollo or Red Rocket has

ever been sold in Wisconsin at any stage of distribution." Petition 13. The District Court expressly found that no Apollo products were purchased in Wisconsin. Petition App. B-13. The District Court specifically found that Red Rocket was not authorized or licensed to do business in Wisconsin and had not solicited sales in Wisconsin. Petition App. C-3.

There is a corresponding absence of evidence that even a single item sold by Capitol has ever been sold in Wisconsin. No party has suggested that Capitol has ever sold any product distributed by someone other than Apollo or Red Rocket in Wisconsin or to a Wisconsin resident.

Respondents rely on Capitol's advertisement in the American Rifleman, a nationally-distributed magazine, to show that Wisconsin is within Capitol's scope

of distribution. However, it is undisputed that Capitol's advertisements stated that Capitol would not sell fireworks where prohibited by law, and it is undisputed that Wisconsin prohibits fireworks. An advertisement so limited can hardly be said to constitute a sales effort purposefully directed toward Wisconsin, or calculated to reach buyers in Wisconsin.

Respondents admit that Petitioners would not be amenable to suit in Wisconsin if they sold to distributors with a limited sales territory, excluding Wisconsin. Brief in Opposition 21. That is precisely the situation established by the evidence in this case. Wisconsin cannot be within Capitol's scope of distribution for the simple reason that no product sold by Capitol has ever been sold in Wisconsin.

Petitioners have received economic benefits from Capitol's sale of their products -- in Minnesota, and in other states, but not in Wisconsin. Petitioners did not benefit from sales in Wisconsin because there were no sales in Wisconsin. The only factor connecting Petitioners with Wisconsin is the use of Petitioners' product in Wisconsin. To uphold jurisdiction based on this factor alone is directly in conflict with World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

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